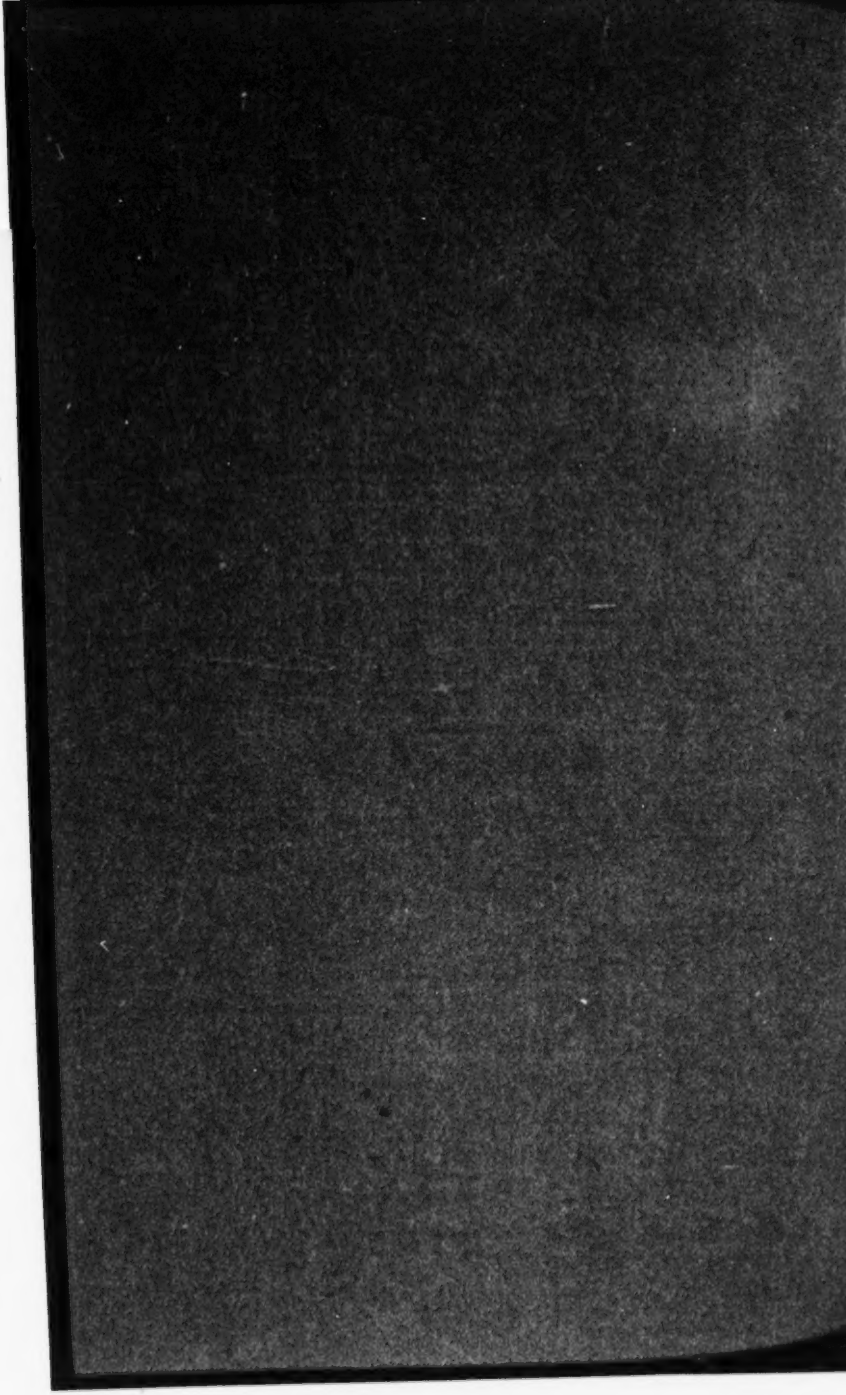

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
FRANK Y. ANDERSON ET AL. } No. 560.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In the act of June 3, 1856 (11 Stat. L., 17), Congress made a grant of public lands in the State of Alabama to aid in the construction of certain railroads in said State, among the roads projected in section 6 of the act being the one represented by the claimants in this case and another that extended from the city of Montgomery to some point on the Alabama and Tennessee State line, in the direction of Nashville, Tenn. The railroad represented by the claimants, specified in said section 6 as the Northeast and Southwestern Railroad, was first to be definitely located, viz, November 25,

1858, and the road from Montgomery in the direction of Nashville was definitely located May 30, 1866. By the acts of October 10, 1869 (16 Stat., 45), and March 3, 1871 (16 Stat., 580), the time within which the roads were required to be built was extended. Both were constructed, however, within the extended period of time.

The grant comprised "every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads." In case it should appear that the United States had, when the lines or routes of the roads were definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the rights of preemption had attached to the same, then it was provided that selection should be made, "subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preemption have attached."

When it became necessary to resort to the indemnity lands from which to make up deficiencies within the place limits, it was found that a part of said indemnity lands was within the indemnity limits common to the grants of both railroads, before mentioned, and among the lands so located within the common indemnity limits was the land out of which this suit arises.

The agents of the road represented by the appellees proffered a list of indemnity selections December 30, 1887, covering among others the two tracts here in question. The said list received the approval of the Secretary of the Interior April 10, 1896.

Between the years 1888 and 1894 certain trespasses were committed upon the lands involved, iron ore and lime rock being removed therefrom, for which suits were brought against the offending parties by the Government and the recovery, by compromise, of $15,000 damages effected. The claimants made demand for this money on the ground that they had already selected the lands; but the Government refused to transfer the amount because the title to the land was still in itself at the time the depredations were committed. Suit was then brought in the Court of Claims against the United States to recover in the name of the appellees the $15,000, and that court, without filing any opinion, rendered judgment for the appellees in the said sum.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In refusing to dismiss the petition of the appellees and in rendering judgment thereon against the United States.

2. In rendering judgment against the United States upon the facts found.

ARGUMENT.

I.

The title to the lands within the place limits of the grant passed as soon as the map of definite location of the line or route of the proposed railroad was filed, but the title to lands within the indemnity limits, the selections of which were subject to the approval of the Secretary of the Interior, did not pass from the United States until the said selections had received the formal sanction of the Secretary, especially in view of the fact that the lands involved were within the indemnity limits common to two grants, and this notwithstanding the fact that if all the lands within the indemnity limits were selected they would not be sufficient to make up the deficiencies within the place limits of the particular railroad involved in this case.

The tracts involved in this case were lieu lands, or those within the limits from which the claimants could indemnify themselves because of deficiencies in the grant. The grant of lands within the place limits was *in presenti*, and the title passed from the United States as soon as the map of definite location of the line or route of the proposed railroad was filed with the Secretary of the Interior, but the title to the lieu lands did not pass until the particular selections of the same had been formally approved by the Secretary.

It is contended, because the quantity of land within the indemnity limits was insufficient to

make up the deficiencies, even if all were taken, that the Secretary of the Interior was not required to separate the lands from a mass of overplus indemnity lands and to exercise judgment or any powers in their nature judicial in selecting them, and that this case constitutes an exception to the rule that title to lieu lands does not pass until the selection shall have been approved by the Secretary. But until the Secretary, through his proper officers, could act in the premises, thoroughly examining all records appertaining, it could not be ascertained that all the lieu lands were required, or, if required, that they were free from prior claims. His action was not merely ministerial, but also judicial. It was his duty, in the first place, to ascertain whether there were any deficiencies in the lands granted to the State of Alabama which would need to be made up from the indemnity limits. He could not take the simple statement of the railroad company that such was the fact; and when it was ascertained that deficiencies did exist, it was necessary that the selections by the railroad company within the indemnity limits be examined to see if any other claims attached, in the event of which it would be necessary for the Secretary to act judicially and determine which was entitled to priority among the conflicting claims.

The effect to be given an indemnity selection proffered under a grant having an indemnity provision similar to that here in question, and the effect of the provision requiring the approval of

the Secretary of the Interior, were given full consideration by this honorable court in the case of the *Wisconsin Central Railroad Company* v. *Price County* (133 U. S., 496) and other cases therein cited. This same principle of the law governing indemnity lands has since been reaffirmed in other cases.

United States v. *Missouri, &c., Railway*, 141 U. S., 358, 375.

Hewitt v. *Schultz*, 180 U. S., 139.

Southern Pacific Railroad Company v. *Bell*, 183 U. S., 675.

Clark v. *Herington*, 186 U. S., 206.

In behalf of the appellees the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* (139 U. S., p. 19) has been cited, where the court said, respecting the indemnity lands: "There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

The language of the court above cited in no wise refutes the oft-repeated doctrine set forth that the title to lieu or indemnity lands does not vest until the selection has been formally approved by the Secretary of the Interior. In the said case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* the facts were not the same as in this case. Here it appears that the lands selected were within the limits of another railroad, the construction of which under the grant from the Government was authorized at the same

time as the grant authorizing the road represented in this case. The question of priority was to be determined. We therefore contend that in the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* the court in its opinion established no new rule governing the titles to indemnity lands, and there is nothing in the language of the grant now under consideration that should make it an exception to the general rule in such cases.

The court, as noted above in the citations given, subsequent to rendering its opinion in the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* (139 U. S., 19), reaffirmed the principle so elaborately set forth in the case of the *Wisconsin Central Railroad Company* v. *Price County* (133 U. S., 496), and referred to its opinion in that case as a statement of the general rule governing the title to indemnity lands.

The act of Congress granting the land was approved June 3, 1856, and the railroad was completed within the extended period of time, viz, April 10, 1872; but the selections of indemnity lands were not filed until December 30, 1887, more than fifteen years later, at which time it was found that the lands selected were within the indemnity limits common to two land grants embraced in one and the same act, and the Secretary of the Interior was called upon to determine to which road the said common indemnity lands belonged.

II.

Priority of right respecting indemnity lands is determined by priority of selection, where the selection is made according to law, and this fact, where the indemnity lands are common to two grants, can not be determined until an examination is made of all claims filed against the said indemnity lands, pending which the title to the indemity lands remains in the United States, and, until the title passes from the United States by the observance of all formalities touching the selection, moneys recovered because of trespasses upon the said indemnity lands between the time of filing the selections and the formal approval of the Secretary of the Interior belong to the United States.

As the court decided in the case of the *St. Paul and Sioux City Railroad Company and Another* v. *Winona and St. Peter Railway Company* (112 U. S., 720), within the indemnity limits common to two grants, neither priority of grant nor priority of location nor priority of construction gives priority of right, but this right is determined by priority of selection, where the selection is made according to law, and the claim which is entitled to priority can not be determined until after due examination. The fact that the deficiencies within the place limits were numerous makes manifest what would be expected in one of the older States, like Alabama, where entries involving almost every section of the public lands have at one time or another been made. That the Secretary's ap-

proval of a selection is necessary to make it complete according to law, and is the equivalent of a patent, is shown in the case of *Frasher et al.* v. *O'Connor* (115 U. S., 102).

In the case of *Barden* v. *Northern Pacific Railroad Company* (154 U. S., 288), it was decided that the title to mineral lands did not pass if the minerals were discovered before the selections had been formerly approved by the Secretary of the Interior, although they might have been developed after all preliminary proceedings had been observed and after the grantee company had done all that was incumbent upon it to be done in earning title to the lands.

In the said case of *Barden* v. *Northern Pacific Railroad Company* the court said:

> It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, the Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake its determination is conclusive against collateral attack.

The question of the character of the lands does not enter into this case, but there were other

questions to be considered by the Secretary of the Interior involving the rights of two railroads before he could decide as to the title to them.

If the claimants did not have title to the lands until the indemnity selections were finally approved by the Secretary, viz, April 10, 1896, then under the decision of the court in the case of the *United States* v. *Loughrey* (172 U. S., 206, 211, 212), the approval of the Secretary carried with it no right of action for prior trespasses or infringements.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. H. WALKER,
Assistant Attorney.

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